

EXHIBIT 7  
DATE 2/13/09  
HB 359

## MEMORANDUM

TO: Representative Mike Milburn, Chairman  
House Natural Resources Committee  
Capitol Building, Helena, Montana

FROM: John Alke  
Hughes, Kellner, Sullivan, & Alke  
Representing Knife River Company

RE: House Bill 359

I was asked to put together a written statement of position on House Bill 359 which corresponds to the oral presentation I gave in testimony before the Committee at the bill hearing on February 9th. I testified that if the only provisions of the bill were the public notice provisions contained in subsections (2) and (3) of Section 2 of the bill, and they were amended as advocated by the Montana Contractor's Association, I would not have appeared on the bill. I testified that it was the other provisions of Section 2 that were the problem, and that they significantly complicated what is currently a fairly simply process. I also testified that I thought there was a drafting error in the bill.

The current process for permitting an open cut mine is well portrayed by the Legislative Auditor at page 7 of his Audit Report 08P-04, which I have attached. The DEQ first determines whether an application is complete, then after it determines it is complete, deliberates upon its merits to determine if it is acceptable:

[U]pon receipt of an application containing all items listed in subsections (1) and (2), the department shall, within 30 days, review the application, inspect the proposed site, and notify the person whether or not the department believes that the application is acceptable.

Mont. Code Ann. § 82-4-432(4)(a)(emphasis supplied). The portion of the excerpt which I underlined is the first step, the determination of completeness, depicted in the Legislative Auditor's diagram. Once the DEQ determines the application is complete, it has 30 days to determine if the application is acceptable. Mont. Code Ann. § 82-4-432(4)(a). If DEQ determines the application is unacceptable, the applicant is notified of the deficiencies identified by DEQ, and allowed to respond to, or cure, the deficiencies. Mont. Code Ann. § 82-4-432(4)(c). Once DEQ determines an application is acceptable, it must issue the permit. Mont. Code Ann. § 82-4-432(4)(d). DEQ can extend the 30 day review provisions by simply notifying the applicant it intends to extend by another 30 days.

As I indicated in my oral testimony, House Bill 359 adds another significant set of steps to the process, and seemingly flip-flops the determinations of "completeness" and "acceptability." Under the bill, DEQ would use the following process:

1. Determine if the application is complete. Page 2, lines 3-4: "[U]pon receipt of an application containing all items listed in subsections (1) and (2), the department shall....
2. Determine within 30 days of determining completeness, if the application is acceptable. Page 2, lines 4-6

NOTE: If the DEQ determines in step #2 that the application is unacceptable, under both the statute as it currently exists, and as proposed in the bill, the DEQ notifies the Applicant of the deficiencies, the Applicant tries to cure, and DEQ has 30 days after the Applicant responds to the notice to address whether the deficiencies have been cured.

3. Set a 30 day notice period. Page 2, lines 25-26. There is no time limit within which DEQ is required to set the notice period after determining the application is acceptable.
4. If any objection to granting the application is received by DEQ within 15 days after the notice period has ended, it must set a hearing. Page 3, lines 20-21. There is no time limit within which DEQ must set the hearing after receiving an objection, or the notice period ends.
5. Within 30 days after the public hearing required in Step #4 is held, the DEQ notifies the Applicant whether its application is complete and acceptable. Page 3, lines 25-28. However, the DEQ has already determined the application is complete in Step #1, and already determined it is acceptable in Step #2.
6. If the DEQ determines in Step #5 that the application is not complete, it advises the Applicant of the deficiencies. Page 3, line 28-29.
7. Within 30 days of receiving the Applicant's response to the notice of deficiency provided in Step #6, the DEQ determines whether the application is now complete. Page 3 line 30 through Page 4 line 2. However, the DEQ has already determined the application is complete in Step #1, and already determined it is acceptable in Step #2. Also, the bill is silent as to whether this DEQ determination is to be treated the same as the earlier DEQ determinations of completeness and acceptability and run through the hearing process again.

I made a mistake when I indicated I felt there was a drafting error in the bill. What I was addressing was the proposed changes in Section 1 of the bill to existing law, specifically Section 82-4-432(4)(d). That section currently reads as follows:

(d) If the application is acceptable the department shall issue a permit to the operator that entitles the operator to engage in open cut mining.

In the bill, at Page 2 line 15, that section is depicted with legislative annotation as follows:

(d) If the application is acceptable it must be processed pursuant to the procedures in [section 2]

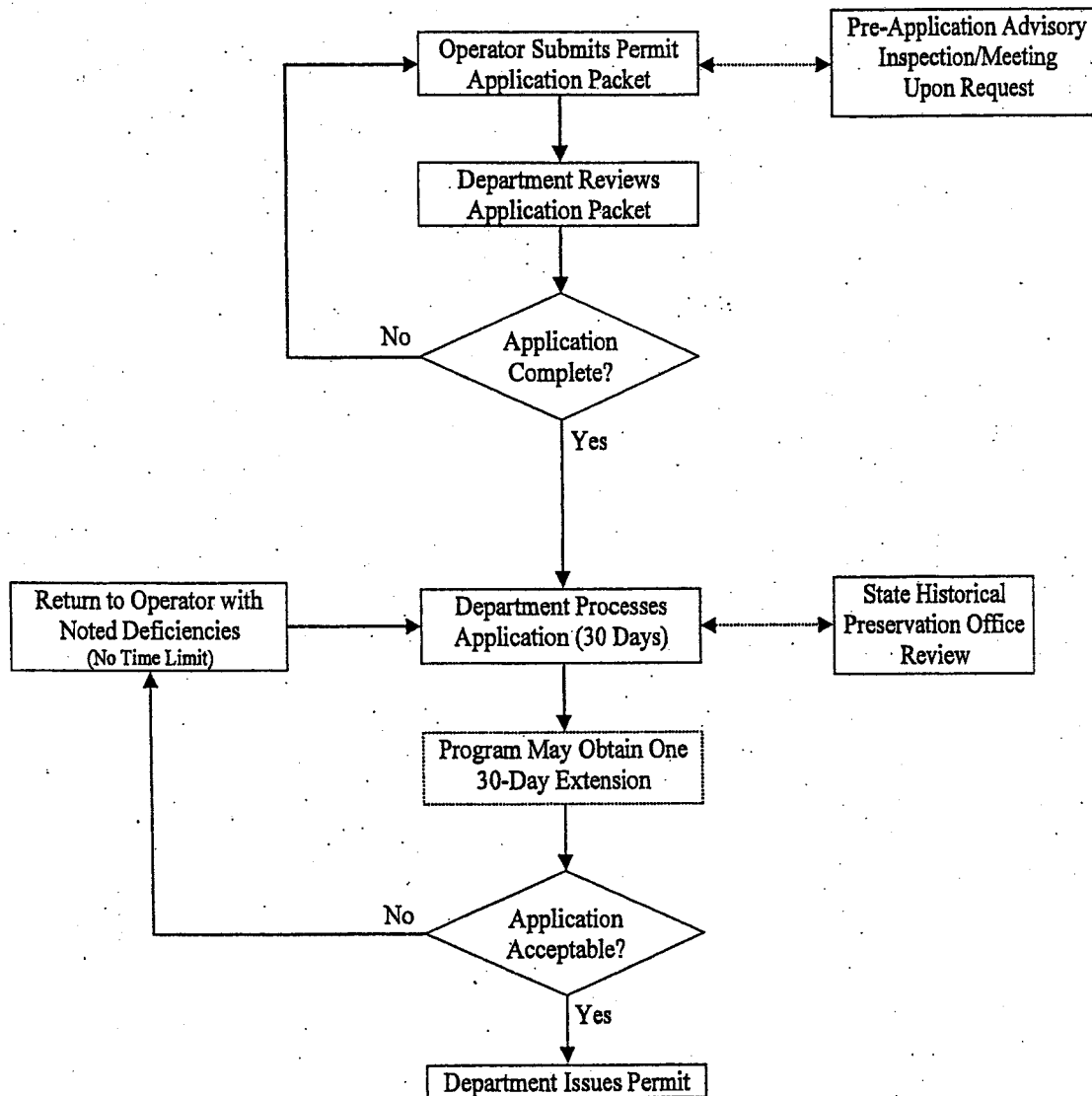
I felt that what was actually being done, but not being shown, was as follows:

(d) If the application is acceptable ~~the department shall issue a permit to the operator that entitles the operator to engage in open cut mining.~~ it must be processed pursuant to the procedures in [section 2].

It was pointed out to me after the hearing that what was being done was move the phrase "the department shall issue a permit to the operator that entitles the operator to engage in open cut mining." to the proposed new subsection (e), and modified to be part of the proposed new completeness standard. I agree. While I personally would have stricken the language in existing subsection (d) and reinserted it in proposed new subsection (e), that is a matter of style, and not a required legislative drafting convention. There is no drafting error in the bill.

operator of any deficiencies in the application. When the applicant returns the revised application, the program has 30 days to determine whether the revisions are acceptable. If the application is still unacceptable, the process is repeated. The following diagram illustrates the application process as outlined in section 82-4-432, MCA.

**Figure 1**  
**Opencut Mine Permit Application Process**



Source: Compiled by the Legislative Audit Division.

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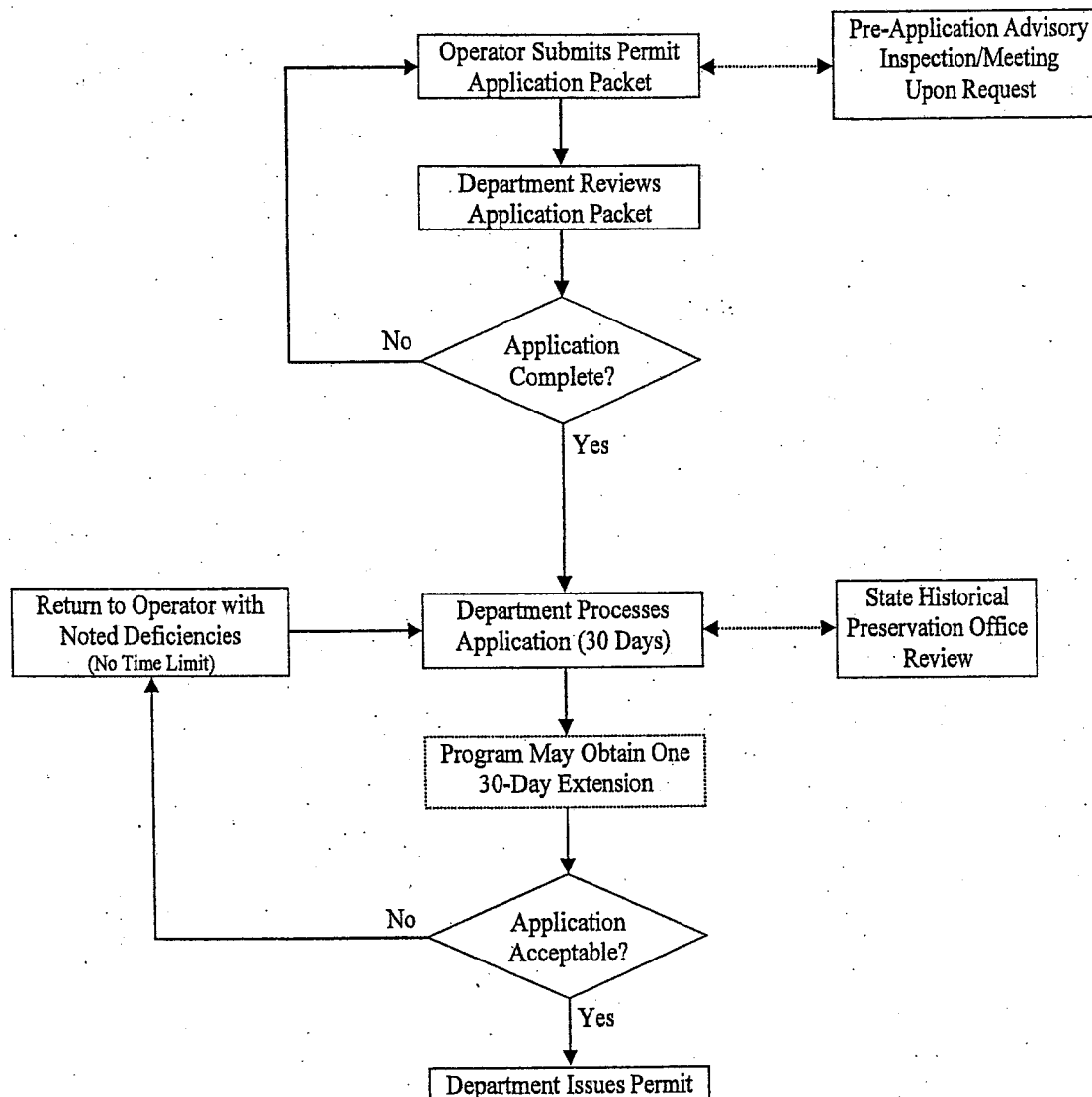
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